No. 91-174

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA, *et. al*,
Petitioners,
vs.
LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF OF *AMICUS CURIAE* ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

When an Indian tribe repurchases reservation land previously alienated to non-Indians by Congress, does the power of state and local governments to tax that land require the unmistakably clear statutory expression of the intent of Congress to permit state taxation, or merely the recordation of these repurchases in state or local land records?

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Oneida Indian Nation of New York ("Oneida Nation") is a federally recognized Indian nation.[1/] This Court upheld the Oneida Nation's right to possession of land reserved to it by agreement with the United States in the 1794 Treaty of Canandaigua, 7 Stat. 44, and taken from the Oneida Nation by the State of New York in violation of the Indian Trade and Intercourse Act ("Nonintercourse Act"). *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*").

In *Oneida II*, this Court recognized that the Oneida Nation has both aboriginal and treaty title to its reservation land. Since this Court's decision in *Oneida II*, and while the Oneida Nation pursues the resolution of its land claims, the Oneida Nation has been repossessing its reservation land by paying current occupants to leave. The Oneida Nation has repossessed about 4,000 acres this way. The Oneida Nation believes that the immunity of its repossessed reservation land from state taxation is beyond dispute.

The Oneida Nation submits this brief in support of the position of Respondent Leech Lake Band of Chippewa Indians ("Leech Lake Band" or "Band") and to urge affirmance of the decision of the United States Court of Appeals for the Eighth Circuit. The

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[1/] Counsel for the parties have consented to the filing of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Oneida Nation also responds to the suggestion by *Amici* States and their political subdivisions that they may ignore Congressional intent and tax all lands of Indian tribes the title to which is recorded in state or local land records.[1/] In support of their suggestion, *Amici* State Associations identify the land repossessed by the Oneida Nation as land that should be taxable by state and local governments. Their suggestion flatly contradicts 200 years of Congressional will and this Court's precedents, including *Oneida II*. It is plainly wrong, and furthermore, invites the Court to decide this case by resolving a question that this case does not present.[2/]

[1/] Brief of the National Association of Counties, National Governors' Association, National League of Cities, National Conference of State Legislatures, U.S. Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, and Council of State Governments as *Amici Curiae* in Support of Petitioners ("State Association *Amici* Brief") at 22, 24, and 26 n.20; Brief of *Amici Curiae* States of Michigan, Alabama, California, Colorado, Idaho, Iowa, Montana, New York, Oklahoma, and Utah in Support of Petitioners ("State *Amici* Brief") at 2 and 15.

[2/] The Oneida Nation corrects factual misstatements by the *Amici* State Associations. Contrary to the representations by the State Associations in their *Amici* Brief at page 22, the Oneida Nation's voluntary grants to school districts are not related to trust applications. Title to Oneida Nation reservation land is not held in trust by the United States, but by the Nation. Nor are these grants the result of negotiations pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68, as the State Associations represent. State Association *Amici* Brief at 23 n. 17. IGRA does not authorize state taxation of Indian tribes or their land. 25 U.S.C. § 2710(d)(3)(C). The gaming compact negotiations between the Oneida Nation and the State of New York took place in 1992 and 1993. The compact was signed by the Secretary of the Interior of the United States on June 4, 1993. 58 Fed. Reg. 33160 (June 15, 1993). The Nation announced its grant program in 1996, long after the Compact negotiations had ended.

STATEMENT OF THE CASE

This case is about statutory interpretation. At issue is whether Congress provided in Sections 4 and 5 of the Nelson Act, 25 Stat. 642, §§ 4 and 5, for taxation of land held by the Leech Lake Band within its reservation. The Court of Appeals correctly held that Congress did not. *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820, 830 (8th Cir. 1997).

The parties to this action agree that Congress made alienable the Leech Lake Band reservation land pursuant to the Nelson Act, 25 Stat. 642. They differ over whether, by making this reservation land alienable, Congress made "'unmistakably clear'" its intention to waive Leech Lake Band's tribal immunity to state *ad valorem* taxation of that land when it is repossessed by the Band. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (*quoting Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). Petitioner Cass County, Minnesota accepts that if Congress was not clear about taxation in the Nelson Act, Cass County may not impose its *ad valorem* tax on Leech Lake Band land. Brief for the Petitioner at 12 (*quoting Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 765).

Amici States and their political subdivisions urge that Congressional intent is not relevant and that the sole determinant of taxability of land held by an Indian tribe is whether that land is recorded as owned by the tribe in state or local land records, *i.e.*, in "fee simple." Specifically, they seek a "rule for the *ad valorem* taxation of parcels owned in fee by Indians or Indian tribes within Indian country." State Association *Amici* Brief at 24; *see also* State *Amici* Brief at 15 (urging taxability by states of "*all* reservation lands owned in fee by a tribe") (emphasis in original). The *Amici* States

and State Associations acknowledge that they seek to avoid having to refer to federal treaties and statutes to determine whether Congress clearly made the land in question taxable. State Association *Amici* Brief at 2, 24-25; State *Amici* Brief at 15; *see also* State *Amici* Brief at 2, *citing Thompson v. County of Franklin*, 1997 U.S. Dist. LEXIS 19832, at * 51-52 (N.D.N.Y. December 5, 1997)("[T]he County takes the position that it . . . is entitled to tax [Indian] plaintiff's property, even in the absence of a congressional act.").

By referring to the state and local land records and tax rolls, rather than to federal law, to determine tribal immunity from taxation, the states also intend to gain the power, for example, to "preclude questionable land development practices." State Associations *Amici* Brief at 12. The states thus intend to use their taxing and regulatory power to override the decisions of tribal governments.

The *Amici* State Associations identify the Oneida Nation as an Indian tribe that has repossessed its reservation land and imply that its land should be taxable. State Associations *Amici* Brief at 26 n.20. Neither they nor the *Amici* States make reference to *Oneida II*, which holds that Oneida Nation land was unlawfully taken without the approval of Congress in transactions that are "void *ab initio*." 470 U.S. at 233. The *Amici* States and State Associations urge that *Yakima*, 502 U.S. 251, supports a holding in this case that all Indian land titled in fee simple in state or local land records is taxable. They do not acknowledge that such land often is restricted against alienation and taxation by federal law, and that its alienation by the states was and is illegal. In particular, they fail to explain that many fee simple title recordations by Indian tribes are made for the very purpose of erasing any and all title claims of non-Indians who possessed the land illegally.

ARGUMENT

THE SUGGESTION BY *AMICI* STATES AND STATE ASSOCIATIONS THAT ALL FEE LAND OF INDIAN TRIBES IS TAXABLE, REGARDLESS OF CONGRESSIONAL INTENT, IS AT ODDS WITH THIS COURT'S PRECEDENTS AND SHOULD BE REJECTED.

The power of states to tax Indian tribes and Indian land is a matter of federal law. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). In recognition of the threat to Indian sovereignty posed by state taxation, this Court has articulated a *per se* rule against state taxation of Indians, Indian tribes, and their property, unless Congress has "made its intention to [allow taxation] unmistakably clear." *Yakima*, 502 U.S. at 258 (internal quotations omitted).[1/] In *Yakima*, this Court found that the General Allotment

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[1/] This Court has consistently applied the *per se* rule against state taxation of Indians and Indian property to a wide range of state taxes. *See, e.g., New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1866) (real property taxes); *Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) (same); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (net income tax); *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976) (personal property tax); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965) (gross receipts tax); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (royalties); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 2217 (1995) (motor fuel and income taxes); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 118 (1993) (same); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (excise taxes); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477 (1976) (cigarette excise tax and vendor's license fees); *Tulee v. Washington*, 315 U.S. 681, 685 (1942) (hunting and fishing fees); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987)(discussing *per se* rule).

Act unmistakably authorized state *ad valorem*, but not excise, taxes on Yakima reservation land that had been alienated by Congress.[5/]

An Indian tribe's "title" in state land records does not determine its taxability. Many Indian tribes in what is now the eastern United States have what is called "aboriginal" title and many tribes also have title recognized by treaties. The Oneida Nation has both aboriginal and treaty title to its reservation land. This Court has acknowledged the Oneida Nation's federally recognized title. *Oneida II*, 470 U.S. at 234-36. The federally recognized title to land held by Indian tribes is not diminished by recordation of that land ownership with the state. It is repugnant to 200 years of decisional authority to suggest that states can ignore an Indian tribe's federally recognized title to land.

Amici States and State Associations seem to assume that tribal land held in fee simple title is freely alienable. *See* State *Amici* Brief and State Association *Amici* Brief *passim*. This is not true for two reasons. First, the Indian tribe may have federally recognized title to the land (*e.g.*, a treaty), and it is clear that such land is not alienable pursuant to the Nonintercourse Act. *Oneida II*, 470 U.S. at 233 (1985). Second, the Nonintercourse Act on its face restricts

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[5/] The suggestion of *Amici* State and State Associations goes beyond taxes. Wholesale application of state laws to Indian land is the necessary implication of the suggestion by *Amici* States and State Associations. State Association *Amici* Brief at 12 (urging this Court to permit states to "preclude questionable land development practices" of Indian tribes). They therefore seek to overturn the broader rule prohibiting the application of state regulatory law to Indian tribes and their land absent federal consent. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (states are without authority to apply their laws to Indian tribes absent Congressional consent); *Cabazon*, 480 U.S. at 221-22 (same).

alienability of all tribal land, whether or not an Indian tribe has aboriginal or other federally recognized title. 25 U.S.C. § 177; *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (applying Nonintercourse Act to tribal land titled in fee simple); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-119 (1960) (same). The Nonintercourse Act provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.*

This Court has held that the land of the Oneida Nation, which was neither allotted nor alienated by Congress, was illegally taken by the State of New York. Efforts to transfer this land away from the Oneida Nation are "void *ab initio*" precisely because of the absence of Congressional consent to the transfers. *Oneida II*, 470 U.S. at 245-46. The rule that transfers without Congressional consent are void *ab initio* would be destroyed by a rule that states may tax and regulate such land held by the Indian tribe today because non-Indians illegally occupied the land in the interim.

After this Court held the transfers of Oneida Nation land to the State of New York void *ab initio*, the Oneida Nation had a choice about the manner in which it would repossess the land to which it holds federally recognized title. It could sue to eject current occupants, but that would create unnecessary hostility and hardship for these neighbors of the Oneida Nation. Or it could, by agreement with occupants willing to leave, end their claims to so-called "title."[6/]

[6/] A typical quit claim deed to the Oneida Nation contains the following language:

The Oneida Nation has been paying fair market value or greater to repossess its land. This orderly and fair approach to rectifying illegal state action long ago cannot be the basis for diminishing Oneida Nation sovereignty over its own land. Otherwise, the Oneida Nation will be forced to abandon non-disruptive, market-oriented solutions to repossession of its lands.

It also is not accurate for the *Amici* States and State Associations to suggest that title to all Indian land must be held in trust by the United States to avoid state taxes and regulation. State *Amici* Brief at 11; State Association *Amici* Brief at 2 and 21-23. They are mistaken for three reasons. First, this Court has held that land titled to an Indian tribe and restricted against alienation is not taxable. *See, e.g., New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1866). In *New York Indians*, this Court voided New York State property taxes on reservation land to which the Seneca Nation held title, holding that state taxes violated the restriction against alienation contained in the Treaty of Canandaigua. The Seneca land was not held in trust by the United States. Second, requiring trust status for Indian land to prevent taxation is fundamentally inconsistent with this Court's decision in *Oneida II*, in which this Court upheld the Oneida Nation's title to its land and its right to repossess that land as its own. 470 U.S. at 233. Third, Congress would not have passed the Nonintercourse Act if trust land status were the *sine qua non* of

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Grantor acknowledges that Grantee asserts certain rights (from time immemorial and under the Treaty of Canandaigua executed between the Grantee and the United States of America on November 11, 1794) to the property that is the subject of this Deed, and in accordance therewith, Grantor agrees (a) to leave, transfer possession of, convey, assign, and transfer to Grantee any and all rights of ownership, occupation, use and enjoyment recognized or purported to be recognized by any governmental entity in said property and (b) to transfer, convey, and assign to Grantee any and all claims that Grantor may have or claim to have in or to said property . . . .

immunity from state taxation. It is precisely because title to land is held by Indian tribes that Congress intervened to prevent states and others from alienating that land without federal approval.[2/]

Congress codified the immunity of Indian tribes from state taxation in those statutes in which it provided certain states, including Minnesota and *Amicus* State of New York, with limited jurisdiction over Indians. 25 U.S.C. § 233 and 28 U.S.C. § 1360. In doing so, Congress expressly withheld authorization from these states to tax Indian property, and that restriction was not limited to trust land. Section 233 of Title 25, for example, grants New York State courts civil jurisdiction over Indians, but provides that

> nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands . . . to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land . . . .

25 U.S.C. § 233. This proviso to Section 233 specifically prohibits taxation of Indian reservation lands by the State of New York. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 391 (1976) (similar provision in 28 U.S.C. § 1360 (P.L. 280) held to withhold federal authorization from Minnesota to tax Indian property). In apparent recognition of federal law, the State of New York's own law exempts tribal reservation land from state and local property taxes, N.Y. Real Prop.

2/ In 1790, when Congress first enacted the Nonintercourse Act, the only Indian lands were those titled to Indians and Indian tribes. 1 Stat. 137; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). Federal trust land status did not then exist.

Tax § 454 (McKinney 1984 & Supp. 1997). All land held by the Oneida Nation in New York is reservation land, pursuant to the Treaty of Canandaigua. *See, e.g., Oneida II*, 470 U.S. at 231-33; *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (reservation established by Congress is established until Congress declares otherwise).

Indian tribes are not under any obligation to record, or to acknowledge recordation of, title to their land with state or local governments. The fact that some may choose to do so, for commercial or other reasons, does not make their land taxable. The only reason for the Oneida Nation to record title to its reservation land among state land records is to clear the errors created by the previous illegal recordations of state law title by non-Indians.

Because the intent of Congress is determinative, the decision of the Court of Appeals for the Eighth Circuit should be affirmed. The seminal rule requiring an unmistakably clear statutory expression of Congressional consent to allow state taxation of Indian land should not be subject to exception.

CONCLUSION

The Oneida Nation respectfully requests this Court to adhere to its *per se* rule against state taxation of Indian tribes absent an unmistakably clear statutory expression of Congressional consent to permit state taxation, and to hold that such an intention was not expressed in Sections 4 and 5 of the Nelson Act.

Respectfully submitted,

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